Supreme Court, U.S.
FILED
MAR 1 1994
OFFICE OF THE CLERK

No. 93-1266

In The

Supreme Court of the United States

October Term, 1993

JOHN T. CASADOS, JERRY DRAPER, ROLAND CARTER, and AUGUSTINE VILLALOBOS and all others similarly situated,

Petitioners,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 1994

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29 pp

QUESTION PRESENTED

Does Denver's Executive Order 94, providing for alcohol or drug testing based upon reasonable suspicion that an employee is under the influence of alcohol or drugs, comply with the Fourth Amendment proscription against unreasonable searches and seizures?

PARTIES

The petitioners list as a party Mayor Federico Peña as Mayor of the City and County of Denver. However, Denver's Mayor is the Honorable Wellington E. Webb.

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The Respondents respectfully request this Court to deny the petition for writ of *certiorari*.

STATUTORY PROVISIONS

In addition to Denver's Executive Order No. 94 set forth verbatim in the Petition for Certiorari, the text of the Fourth Amendment, which is involved in this case, is:

> AMENDMENT [IV] to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

As noted by the petitioners, the decision of the Colorado Supreme Court reversed in part the Colorado Court of Appeals decision in this case. Left unappealed was the decision of the Court of Appeals striking down the petitioners' claims that the Executive Order was unconstitutionally vague or violated their rights to due process. The petitioners had argued that the Executive Order was unconstitutionally vague because it did not precisely define "reasonable suspicion". *Casados v. City and County of Denver*, 832 P.2d 1048, 1051 (Colo.App. 1992). The Court of Appeals concluded "that the term 'reasonable suspicion,' used in the context of this executive order, is sufficiently clear so as to provide reasonable notice to persons of ordinary intelligence of what is prohibited". *Casados v. City and County of Denver*, 832 P.2d at 1052.

A. Statement of the Facts

In 1988, then Denver Mayor Federico Peña issued Executive Order 94, Alcohol and Other Drugs Policy for City and County of Denver Employees. The Executive Order prohibits a city employee from:

1) being under the influence or impaired by alcohol while performing city business or while in a city facility;

2) consumption of alcohol in a city facility, in a city vehicle or on city premises unless consumed at an officially sanctioned private function; or

3) the use, sale, purchase, transfer, or possession of an illegal drug while in a city facility or while performing city business.

This Executive Order does not allow for random or suspicionless drug testing. The Executive Order does provide that when a supervisor has reasonable suspicion that an employee is under the influence of alcohol or illegal drugs, or that the employee is using illegal drugs or alcohol while on duty, the employee may be ordered to undergo drug and/or alcohol testing. Supervisors are required under the policy to protect the privacy of the employee suspected of violating the policy. An appropriate chain of custody is required to be maintained for all specimens obtained in the alcohol or drug screening.

Noncompliance with the supervisor's order to be evaluated for drug or alcohol use will be viewed as refusal to obey the order of a supervisor and may subject the employee to discipline, which may include dismissal. Violation of the policy may result in actions such as discipline, assessment of the employee's alcohol or drug abuse problem, or treatment, depending on the circumstances. Individuals who are disciplined are afforded pre-disciplinary and post-disciplinary due process hearings. Charter of the City and County of Denver, Section C5.25.

Pursuant to the general guidelines of Executive Order 94, procedures have been established for the collection, testing and handling of blood and urine samples for blood and alcohol testing. Urinalysis for drugs is conducted by the state laboratory of the Colorado Department of Health, using an initial immunoassay-type screen and a gas chromatography/mass spectrometry confirmation of all positive initial results. Blood testing is conducted by the toxicology laboratory of Denver General Hospital, using gas chromatography with an F.I.D. detector method. This laboratory is certified by the state Department of Health.

The Executive Order establishes a drug-free awareness program which informs employees about the dangers of drug abuse in the work place, the city's policy of maintaining a drug-free work place, the availability of drug counseling and rehabilitation and the penalties that may be imposed on employees for drug abuse violations occurring in the work place. Training sessions should have been held within each agency to inform the appropriate personnel of the requirements of the Executive Order and the significance of establishing a drug-free work place. Attendance at the training sessions is encouraged for all agency personnel, but especially for supervisors.

The named petitioners were career service employees. Denver Charter §C5.23. Petitioner Jerry Draper was a heavy equipment operator with the Department of Public Works. Mr. Draper was dismissed on August 10, 1989, for refusing to take a breathalyzer after alcohol had been detected on his breath; for leaving the work site without authorization while still on duty; and

for violating attendance rules on twenty-seven different days within a five-month period. Petitioner Draper appealed his dismissal before the Career Service hearing officer, and his dismissal was upheld, not for his refusal to take the alcohol test, but for his attendance and performance problems in conjunction with his prior disciplinary history. He had previously received a written reprimand; and a three-day, five-day and seven-day suspension over a period of several years.

Petitioner Augustine Villalobos is a heavy equipment operator with the Department of Public Works. On January 25, 1990, petitioner Villalobos was given a one-day suspension for exceeding his break period and for being out of his work area. Mr. Villalobos' suspension was not related in any manner to Executive Order 94. Mr. Villalobos appealed his suspension to the Career Service hearing officer, and an evidentiary hearing was held on April 5, 1990.

John Casados was a utility worker with the Department of Public Works. He was assigned to snow removal operations at Stapleton International Airport. On January 1, 1990, Mr. Casados was dismissed for threatening two supervisors; refusing to take an alcohol/drug test; and leaving the work site without authorization. Casados had also established a pattern of excessive use of sick leave. Petitioner Casados appealed his dismissal to the Career Service hearing officer, and he was subsequently reinstated on July 10, 1990.

Roland Carter was a maintenance technician with the Department of Public Works. On December 10, 1989, Carter had difficulty walking, his speech was slurred, and he

had an odor of alcohol on his breath. His supervisor requested that he take a blood alcohol test, to which Carter consented. His blood alcohol tested at .110, resulting in his dismissal on January 10, 1990.

Any offense of intoxication on the job may warrant dismissal. All four of the petitioners, as shown by the description of their positions in the record, worked in safety sensitive positions.

SUMMARY OF THE ARGUMENT

Denver's Executive Order 94 which provides for alcohol or drug testing based upon reasonable suspicion that an employee is under the influence of alcohol or drugs, is a reasonable search and seizure under the Fourth Amendment.

While alcohol or drug testing which is premised upon reasonable suspicion is a search under the Fourth Amendment, only unreasonable searches are prohibited by the Constitution. In determining reasonableness of a search, the Court must balance the individual's Fourth Amendment interests against the importance of the governmental interest concerned.

This Court rejected the need for a warrant for drug testing of governmental employees where there was no reasonable suspicion to conduct a search in prior cases before this Court. Where there has been reasonable suspicion to conduct a search, courts have uniformly upheld drug testing.

ARGUMENT

DENVER'S EXECUTIVE ORDER 94 PROVIDES FOR ALCOHOL OR DRUG TESTING BASED UPON REASONABLE SUSPICION THAT AN EMPLOYEE IS UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, WHICH IS A REASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT.

The Fourth Amendment of the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

The strictures of the Fourth Amendment regarding unreasonable search and seizures is applicable to the City and County of Denver through the Fourteenth Amendment and has been applied to the conduct of government officials in various civil activities. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L.Ed.2d 720 (1985); *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L.Ed.2d 930 (1967). Collection and testing of urine is a search under the Fourth Amendment when undertaken by a governmental entity of its employees. *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L.Ed.2d 639, 660 (1989).

Once the initial inquiry finds the urinalysis test to be a search, the court must then determine whether the search was reasonable. *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. at 619; *Amalgamated Transit Union v. City of Oklahoma City*, 710 F. Supp. 1321, 1325 (W.D. Okla. 1988). What is reasonable depends on the "context within which a search takes place". *O'Connor v. Ortega*, 480 U.S.

709, 719, 107 S. Ct. 1492, 94 L.Ed.2d 714, 724 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L.Ed.2d 720 (1985). In order to develop a standard of reasonableness for a particular type of search, one must balance the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests. *O'Connor v. Ortega*, 480 U.S. at 719; *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. at 619. "In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *O'Connor v. Ortega*, 480 U.S. at 719, 720.

While generally, a non-consensual search is considered reasonable only if authorized by a valid search warrant, *Camara v. Municipal Court, supra*, the Colorado and the United States Supreme Courts have recognized that there are some circumstances in which a warrant requirement is unsuitable such as when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *O'Connor v. Ortega*, 480 U.S. at 720, 107 S. Ct. at 1499, 94 L.Ed.2d at 725, quoting *Camara*, 387 U.S. at 429, 87 S. Ct. at 1731; *People in Interest of P.E.A.*, 754 P.2d 382 (Colo. 1988). This Court has recognized exceptions to the warrant requirement such as the "operation of a government office" where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical." *Skinner v. Railway Labor Executives' Ass'n.*, 480 U.S. at 619, 620. The *Skinner* Court noted that since alcohol and other drugs are eliminated from the bloodstream at a constant rate, and the urine samples to measure these substances must

be obtained as soon as possible, a warrant requirement will defeat the purpose of the test and destroy valuable evidence. 469 U.S. at 623. For this reason too, the Colorado Court of Appeals' ruling in the case at issue that an evidentiary hearing should be held, or proper verification obtained of an employee's job function before a blood or urine test can be administered, even after reasonable suspicion exists that an employee is under the influence of drugs or alcohol, *Casados v. City and County of Denver,* 832 P.2d at 1053, defeats the purpose of the test.

Two United States Supreme Court cases have dealt with drug testing issues, *Skinner v. Railway Labor Executives' Ass'n., supra,* and *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 109 S. Ct. 1384, 103 L.Ed.2d 685 (1989). In *Skinner v. Railway Labor Executives' Ass'n., supra,* the Federal Railroad Administration had promulgated regulations mandating blood and urine tests of railroad employees who were involved in certain train accidents or who violated certain safety rules. One regulation made post-accident testing mandatory, and a second regulation permitted breath or urine tests after a reportable accident or incident, where a supervisor had reasonable suspicion that an employee's acts contributed to an accident or incident or where certain rules had been violated. *Skinner, supra,* 489 U.S. at 609, 611. The regulations were challenged in district court under the Fourth Amendment to the U.S. Constitution. The district court granted summary judgment for the defendants. *Skinner, supra,* 489 U.S. at 612. Upon appeal, the Court of Appeals for the Ninth Circuit reversed the decision of the district court except for the provisions authorizing breath and urine tests

based on a reasonable suspicion of drug or alcohol impairment. *Skinner, supra,* 489 U.S. at 613.

The petition for writ of certiorari in *Skinner* in the Supreme Court was based on a consideration of whether the regulations invalidated by the Court of Appeals violated the Fourth Amendment. Thus it appears that the reasonable suspicion provisions were found constitutional under the Fourth Amendment by the Ninth Circuit and were not the subject of the Supreme Court decision which primarily concerned the post-accident testing. This Court concluded that a railroad need not have a reasonable suspicion of impairment before testing a given employee in the railroad setting where safety was an important consideration.

Moreover, *Skinner v. Railway Labor Executives' Ass'n., supra,* cast doubt on the requirement of individualized suspicion. In upholding post-accident testing, this Court stated:

> We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. (Cite omitted.) In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.
>
> . . . To the extent transportation and like restrictions are necessary to procure the requisite blood, breath, and urine samples for testing, this

> interference alone is minimal given the employment context in which it takes place. Ordinarily, an employee consents to significant restrictions in his freedom of movement where necessary for his employment, and few are free to come and go as they please during working hours. (Cite omitted.) Any additional interference with a railroad employee's freedom of movement that occurs in the time it takes to procure a blood, breath, or urine sample for testing cannot, by itself, be said to infringe significant privacy interests.

Skinner, supra, 489 U.S. at 624-625, 109 S.Ct. at 1417, 109 L.Ed.2d at 664-665.

In a second Supreme Court decision addressing drug testing, *National Treasury Employees' Union v. Von Raab, supra,* in a decision delivered the same day as *Skinner,* this Court ruled that it did not violate the Fourth Amendment for the United States Customs Service to require a urinalysis test for employees seeking transfer or promotion to positions directly involved with drug interdiction, who carry firearms, or who handle classified material which is "truly sensitive". The Court upheld suspicionless testing where there was a compelling interest to safeguard the country's borders and to protect the public safety. *Von Raab, supra,* 489 U.S. at 477. Thus, this Court in *Skinner* and *Von Raab* approved *suspicionless* drug testing without a warrant where public safety is impacted. Where reasonable suspicion exists for a drug or alcohol test, no nexus to public safety is required.

The *Skinner* and *Von Raab* decisions referred to two Supreme Court Fourth Amendment cases which construed searches in an employment or school environment.

In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 82 L.Ed.2d 720 (1985), this Court analyzed a search conducted by public school officials of a student's purse who had been suspected of smoking in a lavatory and concluded that such a search was protected by the Fourth Amendment. The privacy interests of the student whose purse was searched were balanced against the interests of the school to maintain an atmosphere where learning could occur. *New Jersey v. T.L.O., supra,* 469 U.S. at 339-340, 105 S. Ct. at 741-743. *New Jersey v. T.L.O.* established a two-prong test to analyze the legality of school searches: first, "whether the action was justified at its inception" and second, whether the search as actually conducted "was reasonably related in scope to the circumstances which justify the interference in the first place." *New Jersey v. T.L.O.*, 469 U.S. at 341, 105 S. Ct. at 742-43.

In a second United States Supreme Court case in which the Fourth Amendment standard for a search conducted by a public employer was analyzed, this Court reviewed a situation where a physician employee of a public hospital had his office searched while on investigatory leave for alleged violations of personnel rules. *O'Connor v. Ortega,* 480 U.S. 709, 107 S. Ct. 1492, 94 L.Ed.2d 714 (1987). The Court rejected the requirement of obtaining a warrant whenever an employer wished to search an employee's office, desk or file cabinet for a work related purpose since this would "seriously disrupt the routine conduct of business and would be unduly burdensome." 480 U.S. at 722. In *O'Connor v. Ortega, supra,* the Court discussed the need for public employers

to ensure that their agencies operate effectively and efficiently without impediment from work-related misfeasance of its employees.

> Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. . . . The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest.

480 U.S. at 724. Balanced against those public interests were the privacy interests of the government employees in their place of work. The Court found that the expectation of privacy at their place of work was "far less than those found at home or in some other context." 480 U.S. at 725.

While in *O'Connor,* the Court reasoned that an employee could avoid having his or her personal property searched by leaving personal items at home, 480 U.S. at 725; in the case before this Court, employees can avoid the risk of taking a drug or alcohol test based upon reasonable suspicion by not drinking alcohol or using drugs on the job or avoiding intake of such substances off the job to the extent that they would be impaired while at work. This Court concluded that

> Public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for *investigations of work-related misconduct,* should be judged by the

> standard of reasonableness under all the circumstances.

O'Connor v. Ortega, 480 U.S. at 725-26.

When the Colorado Supreme Court adopted the holding of *New Jersey v. T.L.O., supra*, in *People in Interest of P.E.A.*, 754 P.2d 382 (Colo. 1988), it was faced with a situation where reasonable suspicion was based on a police officer's information from a student that other students had brought marijuana to the school for distribution and sale. These facts had been relayed to school officials who searched a student, his locker and his automobile. Applying the first prong of the *New Jersey v. T.L.O.* test, this Court found that the search of a student generally will be "justified at its inception"

> where there are reasonable grounds for suspecting that the search will uncover evidence that the student has or is violating either the law or the *rules of the school.* (Emphasis added.)

People in interest of P.E.A., 754 P.2d at 388.

With respect to the second prong of the Fourth Amendment search analysis, the search conducted in *People in Interest of P.E.A.* was found to be reasonably related to the objectives of the search and not excessively intrusive because of the harm from a contemplated sale of marijuana to other students. 754 P.2d at 389-390.

Applying the two-prong test of *New Jersey v. T.L.O., supra,* to the case at hand, Executive Order 94 requires that supervisors within the City and County of Denver who order a drug test of their subordinates have reasonable suspicion, either based on observation of the

employee's conduct, or other reliable information that the employee is under the influence of alcohol or drugs.

> [R]easonable suspicion is not a requirement of absolute certainty but is the sort of 'common-sense conclusio[n] about human behavior' upon which 'practical people – including government officials' – are entitled to rely.

People in interest of P.E.A., 754 P.2d at 389.

In *O'Connor v. Ortega, supra,* 480 U.S. at 726, the Court held that a search of an employee's office by a supervisor will be justified at its inception when there are reasonable grounds to suspect the search will reveal evidence that an employee is guilty of work-related misconduct. Thus for example, when petitioner Roland Carter came to work he had difficulty walking, his speech was slurred, and he had an odor of alcohol on his breath. Based on these observations, his supervisor requested that he take a blood alcohol test which measured .110 for alcohol. Reasonable suspicion was established for this search, and thus it was justified at its inception.

With respect to the second prong of the *New Jersey v. T.L.O., supra,* test, urinalysis or blood testing is reasonable in scope where the supervisor has an individualized suspicion that an employee is impaired by alcohol or drugs, because to allow an impaired individual to remain on the work site poses a number of hazards. For example, in the City and County of Denver employees staff:

* a hospital providing direct patient care, emergency services, surgical procedures and all related public health activities, Denver Charter § A8.1;

* a department of public works which directs all public improvements, maintains public roads, provides for traffic engineering, creates public utilities, disposes of sewage and garbage, and manages and builds airports, Denver Charter A2.1, *et seq.*;

* a parks department which repairs and maintains park lands and structures, landscapes public lands, runs a zoo and botanic gardens, Denver Charter § A4.1, *et seq.*;

* a police department which is entrusted with suppressing riots, disturbances and breaches of the peace and apprehending persons committing offenses against the laws of the state or ordinances, Denver Charter § A9.4-1;

* a fire department which responds to emergencies, fires and hazardous material incidents, Denver Charter § A9.5;

* theatres and arenas facilities, Denver Charter § A12.1, *et seq.*;

and all other municipal and county functions.

In many of the positions in government, there are jobs were the public safety is directly impacted where random testing would be appropriate. However, even in those areas where there may not be a direct nexus to public safety, once reasonable suspicion of impairment exists, a government cannot continue to provide its services with employees who are visibly impaired by alcohol or drugs on the job. A secretary performing clerical functions who is under the influence of drugs or alcohol on the job can push the wrong button on a computer and wipe out all of its data. A janitor intoxicated by alcohol may be injured by falling down a flight of stairs. An

impaired purchasing agent may misread specifications in a purchase request and order the wrong materials. Each of these individuals could injure himself or herself as well as others. Every tenured employee who is disciplined has the right to appeal that disciplinary action. It is very difficult to establish that just cause exists for the discipline absent drug test verification. Without the ability to present scientific evidence of the impairment, intoxicated workers will not be disciplined and will continue to be a hazard at the worksite. It is imperative to understand that Denver's Executive Order 94 only permits drug or alcohol testing of non-public safety-related employees when there is actual reasonable suspicion that that employee is under the influence of drugs or alcohol.

Moreover, the employment relationship creates a unique scenario in drug and alcohol testing cases. It is a violation of the personnel rules in the various Denver employment systems to be under the influence of alcohol while on duty or to use illegal drugs, narcotics or marijuana on duty. For police officers and fire fighters, use of illegal drugs at any time is prohibited since they are required to be fit for duty at all times. Disciplinary action for intoxication or impairment on the job has been upheld regardless of the job classification. *Brunson v. Commonwealth of Pennsylvania*, 570 A.D.2d 976, 362 N.Y.S.2d 976, 43 (1974) (maintenance employee under influence of alcohol discharged); *O'Connor v. Youngblade*, 96 N.W.2d 457 (Iowa 1959) (dismissal of meter repairman for intoxication on the job). The Colorado legislature has disqualified individuals from unemployment compensation benefits for drug or alcohol use no matter what job they hold. C.R.S. 8-73-108(5)(e)(VIII).

The City of Denver has had numerous prior cases of employees who were found to be under the influence of illegal drugs or alcohol on the job or who were in possession of such drugs on the job. Reported cases include those of *Mangels v. Peña*, 789 F.2d 836 (10th Cir. 1986); *Mayerle v. Civil Service Commission*, 738 P.2d 1198 (Colo. App. 1987); and *City and County of Denver v. Industrial Commission*, 756 P.2d 373 (Colo. 1988).

Since *Skinner, supra*, and *Von Raab, supra*, were handed down by the U.S. Supreme Court, it is now generally accepted that warrantless administrative searches of employees based on reasonable suspicion, and in particular, drug or alcohol testing, are constitutional. *American Federation of Government Employees v. Skinner*, 885 F.2d 884, 886 n.1, (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923, 110 S. Ct. 1960, 109 L.Ed.2d 321 (1990); *National Treasury Employees Union v. Bush*, 891 F.2d 99 (5th Cir. 1989); and *American Federation of Government Employees v. Cavazos*, 721 F.Supp. 1361, 1376 (D.D.C. 1989), aff'd. as to constitutionality of random testing, vacated as to other issues, *sub nom. American Federation of Government Employees v. Sanders*, 926 F.2d 1215 (D.C. Cir. 1991), where the court stated, "Judges of this Court have consistently held that reasonable suspicion testing does not transgress the Fourth Amendment."

The Colorado Supreme Court decision challenged in this petition for certiorari relied on *National Treasury Employee's Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990), which is a good example of the reasonable suspicion versus random testing dichotomy. In *Yeutter, supra*, the United States Department of Agriculture had a program which conducted random urinalysis drug testing of certain motor vehicle operators and reasonable suspicion

drug testing of other department workers. The court separately analyzed each program under the tests established in *Skinner v. Railway Labor Executives' Association, supra,* and *National Treasury Employees' Union v. Von Raab, supra.* The court in *Yeutter* permitted drug testing of workers who did not hold safety sensitive jobs where there was reasonable suspicion of on-duty drug use or drug impaired work performance:

> The Supreme Court has made it clear that the very fact of individualized suspicion goes far toward making a search reasonable where the government has a legitimate interest in confirming the alleged violation.

918 F.2d at 975. The *Yeutter* court applied the "safety sensitive" job test only when it examined the random testing aspects of the USDA program. 918 F.2d at 971-972.

The Colorado Supreme Court also relied upon the opinion of the Ninth Circuit in *American Federation of Government Employees, Local 2391 v. Martin,* 969 F.2d 788 (9th Cir. 1992). In *Local 2391,* the United States Department of Labor had created a policy which called for random drug testing, reasonable suspicion drug testing, and accident or unsafe practice drug testing. *Local 2391, supra,* 969 F.2d at 789. The suit challenged the policy as violating the Fourth Amendment on its face. The only issue before the Ninth Circuit was the district court's modification of the reasonable suspicion testing provision of the plan. The district court had barred drug testing of Department of Labor employees in safety sensitive positions where the basis for testing was reasonable suspicion of off-duty drug use. 969 F.2d at 789. The Ninth Circuit upheld such testing because "the threshold requirement

of reasonable suspicion minimizes the intrusion on the employees' privacy interests." 969 F.2d at 793.

The Colorado Supreme Court correctly concluded that the petitioners' facial challenge to the constitutionality of the executive order must fall where the petitioners failed to meet their burden to show that no set of circumstances exists under which the executive order would be valid. *Casados v. City and County of Denver,* 862 P.2d 908, 913 (Colo. 1993). The Colorado Supreme Court recognized that it "must adopt any reasonable and practical interpretation of the Order that renders it facially constitutional". *Ibid.*

In *Casados,* the court found that it was "evident that the order focuses primarily on the detection and prevention of *on-duty* drug or alcohol use or impairment. In addition, the Order also addresses concerns regarding *off-duty* alcohol and drug use by employees who hold public health-and safety-sensitive positions." 862 F.2d at 914. Thus, the order was found to be constitutional.

The petitioners cite *Taylor v. O'Grady,* 888 F.2d 1189 (7th Cir. 1989), for the proposition that preservation of the general integrity of the work force is an insufficient basis for drug testing. However, the *Taylor v. O'Grady* case did not involve reasonable suspicion testing. It analyzes an annual mandatory suspicionless urine testing program, which the Seventh Circuit distinguished from a situation where an individual is tested after a supervisor has reasonable suspicion of drug use:

> There are two exceptions to this rule. First, an individual may be tested if a supervisor has reasonable suspicion of drug use. *In this*

> *instance, we should no longer use the Von Raab analysis because there is particularized suspicion.* (Emphasis added.)

888 F.2d at 1198, f.n. 9. The *Taylor v. O'Grady* opinion applies the balancing test of *Skinner, supra,* and *Von Raab, supra,* only when it is impractical to have some level of individualized suspicion. 888 F.2d at 1194.

One pre-*Skinner* case which separated its analysis of reasonable suspicion versus random testing is *National Treasury Employees Union v. Lyng,* 706 F.Supp. 934 (D.C.D.C. 1988). In *Lyng,* a challenge was raised to the reasonable suspicion urinalysis testing of employees who were in non-safety related positions. Only certain positions were subject to random urinalysis testing while all employees were subject to reasonable suspicion testing. 706 F.Supp. at 935-36. This testing was upheld by the court where it was based on reasonable, articulable, and individualized suspicion that a specific employee may be under the influence of drugs while on duty. 706 F. Supp. at 950. The same case struck down random testing of non-safety sensitive positions.

Thus, Executive Order 94 passes constitutional muster because it requires reasonable, individualized suspicion before action may be taken.

CONCLUSION

The respondents respectfully request this Court to deny the petition for writ of certiorari. The reasonable suspicion searches contemplated by Denver's Executive Order 94 are premised upon notice to all Denver employees that if they are impaired by drugs or alcohol on the job, they may be ordered to undergo drug or alcohol testing. Absent a reasonable suspicion of such impairment, no testing occurs. The Colorado Supreme Court properly upheld the constitutionality of this policy.

Respectfully submitted,

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